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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSÉ POLICE OFFICERS ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSÉ, BOARD OF ADMINISTRATION FOR POLICE AND FIRE RETIREMENT PLAN OF CITY OF SAN JOSÉ, and DOES 1-10 inclusive.,

Defendants.

AND RELATED CROSS-COMPLAINT AND CONSOLIDATED ACTIONS.

Case No. 1-12-CV-225926

[*Consolidated with Case Nos. 112CV225928, 112CV226570, 112CV226574, 112CV227864]*

DEFENDANT CITY OF SAN JOSE'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Date: March 5, 2013
Time: 9:00 a.m.
Dept.: 8

Complaint Filed: June 6, 2012
Trial Date: None Set

BY FAX

TABLE OF CONTENTS

Table of Authorities

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

The motion for preliminary injunction is plainly deficient and should be rejected. As a preliminary matter, plaintiffs (who represent only three of five consolidated cases) have failed to inform the Court that nothing in Measure B could possibly have an impact on anyone for months. Thus, there is no showing – nor could there be – that an injunction is necessary to preserve the status quo until a trial on the merits. The City has filed a Motion for Summary Adjudication set for late April, and all parties are actively discussing a trial date in June, before impacts of Measure B would occur. For this reason alone, the motion must be denied.[1]

Beyond this fundamental defect, there are several independent grounds upon which the motion should be denied. Most critically, a motion for preliminary injunction requires a threshold showing that irreparable harm will occur unless the injunction issues. Plaintiffs ignore this standard. Their first argument is that active employees will have to contribute 4% more in pay toward their pension benefits. But "if the plaintiff may be fully compensated by the payment of damages in the event he prevails, then preliminary injunctive relief should be denied." *Tahoe Keys Property Owners' Ass'n v. State Water Resources Control Board*, 23 Cal. App. 4th 1459, 1471 (1994). This principle *is exactly on point and controlling* with respect to their motion, as plaintiffs' motion is premised on their claim that they will pay more for retirement benefits or be denied a future benefit.

Even if the plaintiffs could overcome these fundamental flaws, they must still demonstrate that there is a likelihood of success on the merits. In this regard, their broad brush, summary presentation fails. They simply cite vested rights pension cases, point to Measure B, and claim they will prevail. They conduct virtually no analysis, as required by *Retired Employees Association of*

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[1] The City's Motion for Summary Adjudication is currently set for April 23, 2013. In connection with the City's Motion for Summary Adjudication, the City filed a Memorandum, the Declaration of Alex Gurza, dated 2/7/13 ("Gurza MSA Dec."), and a Request For Judicial Notice, also dated 2/7/13 ("MSA RJN"). Rather than refile the voluminous exhibits filed in support of the Motion for Summary Adjudication, the City incorporates them here as part of this Opposition. Also in support of this Opposition to Plaintiffs' Motion for Preliminary Injunction, the City has filed a separate Declaration of Jennifer Schembri, dated 2/20/13 ("Schembri Dec."), and a separate Evidence and Request for Judicial Notice, dated 2/20/13 ("2/20/13 RJN").

Orange County v. County of Orange (*REAOC*), 52 Cal. 4th 1171 (2011). They do not even bother to discuss San Jose's Charter and its reservation of rights clauses; they fail to acknowledge that their own labor unions have made agreements with the City that are inconsistent with their current position; and they ignore key provisions of the Municipal Code. For example, contrary to their claim, the Municipal Code *specifically permits* the City to require additional pension contributions to defray unfunded liabilities. These issues are discussed at length in the City's Motion for Summary Adjudication and supporting declarations and exhibits. There is no basis to issue an injunction under these circumstances.

ARGUMENT

I. PLAINTIFFS CANNOT SHOW IRREPARABLE HARM

To obtain a preliminary injunction, "a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits." *White v. Davis*, 30 Cal. 4th 528, 554 (2003).

If plaintiffs do not face irreparable injury during the course of the litigation, the inquiry ends; the Court need not address plaintiffs' likelihood of success on the merits or engage in a balancing of harms. *Jessen v. Keystone Savings and Loan Ass'n*, 142 Cal.App.3d 454, 459 (1983) (affirming denial of preliminary injunction where no risk of irreparable injury was shown). A court may deny a preliminary injunction solely on the basis of plaintiffs' failure to demonstrate irreparable injury. *Ibid.*

To meet the irreparable-injury threshold, plaintiffs must satisfy two requirements. First, plaintiffs must allege an injury other than monetary loss. Second, plaintiffs must demonstrate that this alleged injury is "imminent." For a preliminary injunction, "imminent" means *during the course of the litigation.* Code Civ. Proc. § 526(a)(3).

A. Plaintiffs' Alleged Injuries Are Not "Irreparable" For Purposes of a Preliminary Injunction Because They Involve Only Monetary Loss

Because plaintiffs' alleged injuries (decreases in compensation or denial of benefits) involve only monetary loss, a preliminary injunction is not available.

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"In general, if the plaintiff may be fully compensated by the payment of damages in the event he prevails, then preliminary injunctive relief should be denied." *Tahoe Keys Property Owners' Ass'n v. State Water Resources Control Board*, 23 Cal.App.4th 1459, 1471 (1994) (affirming denial of preliminary injunction barring collection of mitigation fees, in part, because damages would be readily ascertainable and plaintiffs could be fully compensated); *Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.*, 255 Cal.App.2d 300, 306 (1967) ("[I]f monetary damages afford adequate relief and are not extremely difficult to ascertain, an injunction cannot be granted.") (vacating a preliminary injunction when monetary damages were an adequate remedy); Cal. Code Civ. Proc. § 526(a)(4) (providing that injunctive relief is available "[w]hen pecuniary compensation would *not* afford adequate relief" (emphasis added)).

This concept has been applied to wage loss by federal courts, which consistently hold that wage loss is not an irreparable injury.

> [T]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury...."The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of the litigation, weighs heavily against a claim of irreparable harm."

Sampson v. Murray, 415 U.S. 61, 90 (1974) (holding that employee seeking a preliminary injunction was required to show irreparable injury, which could not be based on temporary loss of earnings); *Dev v. Donahoe*, No. S-11-2950, 2012 U.S. Dist LEXIS 54731, at *9 (E.D. Cal. Apr. 18, 2012) ("Plaintiff also fails to show that he is likely to suffer irreparable harm in the absence of preliminary relief. While plaintiff contends his salary will be lowered as a result of the recent route adjustment, the loss of salary does not amount to irreparable harm. [Citation to *Sampson v. Murray* omitted]"); *Kirby v. Brown*, No. S-13-0021, 2013 U.S. Dist. LEXIS 11240, at *15 (E.D. Cal. Jan. 28, 2013) ("The harm to plaintiff herself meanwhile, is all financial in nature: lost wages and benefits; her home will go into foreclosure because of her lost wages; terrible tax consequences will result when she cannot repay a tax-advantaged loan because of her lost wages. Ordinarily, monetary losses do not constitute irreparable injury....").

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Here, plaintiffs seek an injunction to block various sections of Measure B from affecting their compensation: Section 1506-A (requiring employees to contribute to reduce pension plan unfunded liabilities); Section 1512-A (requiring employees to contribute to reduce retiree healthcare unfunded liabilities); Section 1509-A (refined definition of disability for retirement purposes); Section 1511-A (discontinuing the SRBR payments and reserve); Section 1510-A (giving the City Council authority to suspend COLA payments in cases of fiscal emergency). As a matter of law, these types of injuries are not irreparable, and cannot be addressed through a preliminary injunction. On this basis alone, plaintiffs' motion must be denied.

B. Plaintiffs' Alleged Injuries Are Not Imminent

Even if an injury is "irreparable" for purpose of a preliminary injunction, that injury must be "imminent." To be imminent, the injury must be likely to occur "prior to the trial on the merits." *Tahoe Keys Property Owners' Ass'n v. State Water Resources Control Board*, 23 Cal.App.4th at 1471 ("[A] plaintiff must make some showing which would support the exercise of the rather extraordinary power to restrain the defendant's actions *prior to a trial on the merits*" (emphasis added).); Cal. Code of Civ. Proc. § 526(a)(3).

With the exception of the changes to SRBR which already have been implemented, the City has no plans to implement any Measure B provisions described above prior to the June 2013 trial date being discussed by the parties. (Declaration of Jennifer Schembri ISO Opposition to Motion for Preliminary Injunction ("Schembri 2/20/13 Dec."), ¶¶ 4, 7, 8, 10, 14, 16.)

For example, Section 1509-A concerns the City's disability retirement program, but the City has not set an implementation timetable. (Schembri 2/20/13 Dec., ¶¶ 9, 10.)

The same is true with respect to the other Measure B sections at issue in Plaintiffs' motion: Sections 1506-A (employee contributions to pension unfunded liabilities), 1510-A (authority to suspend COLAs), 1512-A (employee contributions for retiree healthcare); they have not been implemented, and the City has no plans to do so prior to the June dates being discussed for trial. (Schembri 2/20/13 Dec., ¶¶ 4, 7, 8, 16.)

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In fact, the only Measure B section that specifies an implementation date is Section 1506-A, which targets June 23, 2013. (Schembri 2/20/13 Dec., ¶ 4.) But that is two months after the City's motion for summary adjudication hearing and, likely, not until after a trial on the merits.

II. PLAINTIFFS CANNOT SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS

Not only can plaintiffs not show irreparable harm, they also cannot show a likelihood of success on the merits. The City has thoroughly briefed most of these issues on the merits in its Motion for Summary Adjudication and summarizes the key points below.

A. Plaintiffs Misstate the Law on Vested Rights

In its motion for summary adjudication, the City warned that Plaintiffs would rely on the pension vested rights cases that flow from *Kern v. City of Long Beach*, 29 Cal. 2d 848 (1947), and argue that Measure B is unlawful because it reduces employee compensation or benefits without granting a corresponding advantage. This simplistic argument ignores plaintiffs' burden to prove a vested right and the core question – whether the City in fact did create vested rights.

In *REAOC*, the California Supreme Court confirmed the presumption "that a statutory scheme is not intended to create private contractual or vested rights." *REAOC*, *supra*, 52 Cal.4th at 1186-1187. The Court explained that an ordinance or resolution "may be said to create contractual rights when the statutory language or circumstances accompanying its passage 'clearly'... evince a legislative intent to create private rights of a contractual nature enforceable against the [governmental body].'" *Id.*, quoting *Walsh v. Board of Administration,* 4 Cal.App.4th 682, 697 (1992).

In *REAOC*, the Court also emphasized the importance of proceeding cautiously "both in identifying a contract within the language of a … statute and in defining the contours of any contractual obligation.'" *REAOC*, 52 Cal.4th at 1189. Even prior to *REAOC*, the Supreme Court had affirmed this basic principle in determining whether a city charter and local ordinances had conferred a vested right. In *International Ass'n of Firefighters, Local 145 v. City of San Diego*, 34 Cal.3d 292 (1983), the Supreme Court rejected a claim of vested rights because:

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> In the present case, no modification was made in the retirement system; instead, the revision in the factor representing future compensation of employees and the resulting revision in the rate of contribution of employees were made *pursuant* to the charter and ordinances which delineate City's retirement system and prescribe the employees' vested rights."

Int'l Ass'n of Firefighters, 34 Cal. 3d at 300-302. Here, just as *International Association of Firefighters,* Measure B's changes were made "pursuant" to the City's charter and ordinances.

B. Each Cause of Action Asserted by Plaintiffs Fails Based on the Charter's Express Reservation of Rights to Modify the Retirement Plans

Plaintiffs completely ignore the San Jose City Charter's reservation of rights, which grants the City broad discretion to "modify or otherwise change" the City's retirement plans. As adopted by the voters in 1965, the San Jose City Charter states: "Subject to other provisions of this Article, the Council may at any time, or from time to time, amend or otherwise change any retirement plan or plans or adopt or establish a new or different plan or plans for all or any officers or employees." (MSA RJN, Exh. G (Charter as adopted in 1965), § 1500.) The Charter also provides, as to retirement systems already existing in 1965, the City shall have "the power and right to repeal or amend any such retirement system or systems, and to adopt or establish a new or different plan or plans for all or any officers or employees." Charter, § 1503 (emphasis added).

A reservation of rights clause "is explicit evidence of legislative intent regarding the question of vested retiree health benefits" that "falls squarely" against the finding of vested rights. *Retired Employees' Association of Orange County v. County of Orange*, No. SACV 07-1301 AG, 2012 U.S. Dist. LEXIS 146637, at *29 (C.D. Cal. Aug. 13, 2012). Like federal courts, California courts recognize the power of reservation of rights clauses to preclude the establishment of vested rights to retirement benefits. "The modification of a retirement plan pursuant to a reservation of the power to do so is consistent with the terms of any contract extended by the plan and does not violate the contract clause of the federal constitution." *Walsh*, 4 Cal.App.4th at 700.

Leading federal cases have found similar reservation of rights provisions to preclude the creation of vested contractual rights. *National Railroad Passenger Corporation v. A.T. & S.F.R. Co.*, 470 U.S. 451, 466 (1985) ("Indeed, lest there be any doubt in these cases about Congress' will, Congress 'expressly reserved' its right to 'repeal, alter or amend' the Act at any time. (citation

omitted) This is hardly the language of contract."); *Flemming v. Nestor*, 363 U.S. 603, 610-611 (1960) ("It was doubtless out of an awareness of the need for such flexibility that Congress included in the original Act, and has since retained, a clause expressly reserving to it 'the right to alter, amend, or repeal any provision' of the Act."); *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 51 (1986) ("Since the Act was designed to protect future, as well as present, generations of workers, it was inevitable that amendment of its provisions would be necessary in response to evolving social and economic conditions unforeseeable in 1935. . . .").

Plaintiffs contend that various sections of the Municipal Code created vested rights to employee contribution rates and benefits. But it is hornbook law that a provision in a municipal code that conflicts with the charter is void and unenforceable. *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal.4th 161, 171 (1994) ("Any act that is violative of or not in compliance with the charter is void"); *Lucchesi v. City of San José*, 104 Cal.App.3d 323, 328 (1980) ("Ordinances passed pursuant to the plenary authority of article XI, section 5 of the state Constitution are invalid if they conflict with a city's charter").

C. Plaintiffs' Challenge to Charter Section 1506-A (Increased Contributions to Defray Unfunded Liabilities) Is Not Likely to Succeed on the Merits

Section 1506-A requires employees, beginning June 23, 2013, to make additional pension contributions. The Charter's reservation of rights permits this change, but even in its absence, Plaintiffs cannot prove that Section 1506-A violates their vested rights.

1. The Municipal Code Authorizes Payment of Additional Employee Pension Contributions to Defray the City's Pension Plan Unfunded Liabilities

Plaintiffs cite the sections of the Municipal Code that require the City to pay for pension plan unfunded liabilities. But they fail to mention that the Code also contains provisions that authorize "additional" employee contributions for the purpose of paying unfunded liabilities.

For Federated employees, the Municipal Code provides: "Notwithstanding any other provisions of this Part 6 or of Chapter 3.44, *members of this system shall make such additional retirement contributions as may be required by resolution adopted by the city council or by executed agreement with a recognized bargaining unit.*" (Municipal Code § 3.28.755) (emphasis added).

The "additional" contributions are to be used to defray the City's pension plan retirement contributions – which include payment of unfunded liabilities. (Municipal Code § 3.28.955.)

Under the Police and Fire Plan, employees not subject to interest arbitration "*shall make such additional retirement contributions as may be required by resolution adopted by the city council or by executed agreement with a recognized bargaining unit.*" (Municipal Code 3.36.1525(A), emphasis added.) Police and Fire Plan employees subject to interest arbitration, "shall make such additional retirement contributions for fiscal years 2010-2011 as may be required by executed agreement with a recognized bargaining unit or binding order of arbitration." (Municipal Code § 3.36.1525(B).) In both cases, the additional employee contributions are to be used to defray the City's pension plan contributions, including contributions towards unfunded liabilities. (§ 3.36.1525 (C).)

Based on the Charter and Municipal Code, plaintiffs cannot meet their burden under *REAOC* to prove that the City's statutory scheme "clearly" demonstrates "a legislative intent" that the City pay all unfunded liabilities. *REAOC*, 52 Cal.4th at 1186-1187. Both the California Supreme Court and courts of appeal have permitted increases in employee contribution rates based on the language of the pension statute. *See International Ass'n of Firefighters v City of San Diego,* 34 Cal.3d at 295; *Pasadena Police Officers Ass'n v. City of Pasadena,* 147 Cal.App.3d 695, 710-11 (1983). In *International Association of Firefighters*, the Court held that: "Rather than being foreign to the City's retirement system, modification of contribution rates of both employees and the City is intrinsic to the ordinances basing those rates on actuarial factors, which can be revised." *Id.* at 300; *Pasadena Police Officers Ass'n*, 147 Cal.App.3d at 711. Similarly, the San José City Charter does not fix contribution rates for unfunded liabilities, but leaves the matter to City ordinances, under which the contribution rates can be – and were – revised.

2. City Labor Unions, Including Those Representing Plaintiffs, Have Agreed that Employees May Be Legally Required to Pay Towards Unfunded Liabilities

Plaintiffs also fail to inform the Court that labor unions – including unions that represent plaintiffs – have specifically agreed that members will make "additional" contributions to pay for unfunded liabilities. In 2010, many unions, including those representing plaintiffs, either agreed to

an increase in the employee contribution rate for the purpose of paying for unfunded liabilities or agreed to a reduction in employee compensation. (Gurza MSA Dec. ¶¶ 24, 25.) For example, the 2010-2011 MOA between the City and AEA, of which plaintiff Mukhar is the president, states

> Ongoing Additional Retirement Contributions. Effective June 27, 2010, all employees who are members of the Federated City Employees' Retirement System will make additional retirement contributions in the amount of 7.30% of pensionable compensation, and the amounts so contributed will be applied to *reduce the contributions that the city would otherwise be required to make for the pension unfunded liability*, which is defined as all costs in both the regular retirement fund and the cost-of-living fund, except current service normal costs in those funds. . . . *The intent of this additional retirement contribution by employees is to reduce the City's required pension retirement contribution rate by a commensurate 7.30% of pensionable compensation as illustrated below . . .*

(Gurza MSA Dec., ¶ 27, Exh. 11, emphasis added.)

The unions also agreed to the City amending the Municipal Code to provide for the payment by employees of these "additional contributions." (*Id.* at Section 10.1.4) (Gurza MSA Dec. ¶¶ 27-28, Exhibits 11, 15, 17, 23, 25, 29.) The next year, the City reached an agreement with most unions for a 10% total compensation reduction. (Gurza MSA Dec. ¶¶ 26, 30, Exhs. 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 31, 34.) Whether in the form of additional contribution rates, or reduced wages, the purpose was to defray the City's pension contributions for unfunded liabilities and thereby preserve City services.

Based on these agreements, plaintiffs cannot prove a vested right to the City paying all unfunded liabilities. Vested rights are not subject to collective bargaining and cannot be negotiated away. *California Teachers' Ass'n v. Parlier Unified School District*, 157 Cal.App.3d 174, 183 (1984) (holding that a collective bargaining agreement could not waive benefits to which employees were statutorily entitled). Moreover, "[v]ested rights may not be implied … where, as here, they are contrary to the express terms of the parties' contract." *City of San Diego v. Haas*, 207 Cal.App.4th at 495, citing *REAOC*, 52 Cal.4th at 1179-1182, 1187. Here, the unions agreed that their members would pay increased contribution rates, and that the Municipal Code could be revised to authorize them. The agreements defeat any vested rights claims.

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Finally the unions treated contribution rates as interchangeable with wage reductions – to which there is no vested right. "It is well established that public employees have no vested rights to particular levels of compensation and salaries may be modified or reduced by the proper statutory authority." *San Diego Police Officers' Ass'n v. San Diego City Employees' Retirement System,* 568 F.3d 725, 737 (9th Cir. 2009); *see also Butterworth v. Boyd*, 12 Cal.2d 140, 150 (1938) (same). Here, the unions agreed to pay for unfunded pension liabilities through both additional contribution rates and lower wages. (Gurza MSA Dec. ¶¶ 25, 26, 27, 30-31, Exh. 35.) Given the interchangeability of contribution rates and wages, plaintiffs cannot prove a vested right to a particular contribution rate.

D. Plaintiffs Cannot Show a Likelihood of Success on the Merits on Their Challenge to Charter Section 1512-A (Retiree Health Care Funding)

Measure B requires that: "Existing and new employees must contribute a minimum of 50% of the cost of retiree healthcare, including both normal cost and unfunded liabilities." (Section 1512-A.) Plaintiffs claim that it is the City's obligation to pay for all retiree healthcare unfunded liabilities. Again, the City Charter's reservation of rights defeats any claim of a vested right but, even without the Charter's reservation of rights, Plaintiffs cannot prove their case.

In the case of both the Federated and the Police and Fire retirement plans, the Municipal Code requires that employees and the City make contributions towards retiree medical benefits on a one-to-one ratio. (Municipal Code § 3.28.385(C); Municipal Code § 3.36.575(D).) Historically, the contributions from employees and the City did not fully prefund the cost of employee retiree medical benefits. (Gurza MSA Dec., ¶ 35.) In 2007, the City was grappling with GASB reporting standards that required state and local governments to disclose the full cost of "unfunded actuarial liabilities" for "Other Post-Employment Benefits" ("OPEB") such as retiree health care. Beginning in 2009, the City reached agreement with most City unions for employees to make annual contributions to fund up to 50% of the unfunded liabilities of retiree healthcare costs. (Gurza MSA Dec. ¶¶ 38, 39, Exhs. 21, 39-41.)

The payments of the full Annual Required Contribution ("ARC") were to be phased in incrementally but: "[B]y the end of the five year phase-in, the City and plan members shall be

contributing the full Annual Required Contribution in the ratio currently provided under Section 3.28.380 (C) (1) and (3) of the San José Municipal Code." (Gurza MSA Dec., Exh. 39- 43, and AEA §12.3.)[2] Therefore, through these agreements, most City unions involved in these actions agreed to incrementally phase-in payment of 50% of the "full ARC" – that is, 50% of the full cost of paying future retiree health benefits, including the unfunded actuarial liabilities.

There was never an express or implied commitment by the City to pay all unfunded liabilities for retiree healthcare and the City never has done so. The Municipal Code states only that employees and the City shall pay for retiree healthcare in a one-to-one ratio and is silent as to unfunded liabilities. *REAOC*, 52 Cal.4th at 1185 (where retirement benefits must be set by ordinance, courts must look to ordinances to determine parties' contractual rights and obligations). Nor is there anything in the parties' conduct that supports a requirement that the City pay for all unfunded liabilities. Before GASB, the City simply was not focused on a method of paying for *all* unfunded liabilities. Once the issue surfaced, all parties treated the issue as subject to change and fully negotiable.

Plaintiffs may point to a course of conduct – that is, in the past employees did not pay for half of all unfunded liabilities related to the retiree medical plan. This very argument was rejected in *Sappington v. Orange County Unified School District*, 119 Cal.App.4th 949, 953 (2004), which explained: "The fact that the District provided a free PPO benefit for 20 years – before health insurance premiums skyrocketed and the cost of PPO coverage began far outpacing the cost of HMO coverage – does not prove the District promised to provide that option forever." *Sappington*, 119 Cal.App.4th at 955. Accord *REAOC*, 2012 U.S. Dist. LEXIS 146637, at **1, 37 (rejecting claim by Orange County retirees that "the County's 23-year practice of annually authorizing this generous [subsidization] policy morphed into an implied contract requiring the County to guarantee this benefit for life"). The instant case is even stronger than *Sappington* and *REAOC*, because here

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[2] Of the unions, the Firefighters and POA have a slightly different agreement, which caps the agreement to pay towards unfunded liabilities at 10% of pensionable pay for employees and provides for meet and confer and dispute resolution procedures for amounts over that percentage. (Gurza MSA Dec., Exh. 21, Article 29 [Firefighters], Exh. 41, Article 50 [SJPOA].)

retiree healthcare contribution rates previously included some portion towards unfunded liabilities. (Gurza MSA Dec., ¶ 35, Exh. 36.).

E. Plaintiffs Cannot Prove a Likelihood Of Success on the Merits on Their Challenge to Charter Section 1509-A (Disability Retirement)

Plaintiffs cannot prove they are likely to prevail on the merits because, among other reasons, the City has yet to formulate a plan for implementation of this section. To prevail on a facial challenge, Plaintiffs "must demonstrate that the act's provisions inevitably pose a present and total and fatal conflict with applicable constitutional provisions." *Tobe v. City of Santa Ana,* 9 Cal. 4th 1069, 1084 (1995): A facial challenge to a legislative act "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Myers, Inc. v. City & County of San Francisco*, 253 F. 3d 461, 467 (2001). Plaintiffs cannot show a likelihood of success on this issue, because the City has not yet implemented the new disability retirement requirements.

Plaintiffs contend that Measure B's section on disability retirement causes an impermissible impairment of contract, primarily citing *Frank v. Bd. of Admin.*, 56 Cal.App.3d 236, 243 (1976). But *Frank* addresses a change in benefits, not eligibility, and is thus inapposite. *Frank,* 56 Cal.App.3d at 245 (change would result in decrease in allowance from $475 to $90). More instructive is *Gatewood v. Board of Retirement*, 175 Cal.App.3d 311, 320-321 (1985), which upheld a change in the definition of disability. In *Gatewood*, a 1980 amendment had the effect of narrowing the eligibility requirement. The court found, however, that the amendment "effected no perceptible change" in the benefit; that even if the amendment did modify contract rights, it "would still be constitutionally permissible" because it did "not eliminate" or "reduce" benefits, but rather "reasonably refined the threshold criteria" for reward; and finally, any disadvantage was "counterbalanced" by an expansion of non-service-connected disability benefits. *Id.* at 319-321.

Although assessment of this section must await implementation by the City, Measure B neither eliminates disability pensions nor reduces benefits, but instead refines the definition of disability to bring it in line with the purpose of disability retirements. Measure B responded to a City Auditor Report, "Disability Retirement: A Program In Need Of Reform," dated 4/14/11, which

reported that many employees granted disability retirements were still able to work. (2/19/13 RJN, Exhs. 1 (Ballot Argument), 2 (Report to the City Council, Office of the City Auditor, pp 20-26).) Moreover, Measure B offers compensating advantages, for example: (1) the decrease in the time of duration of the disability from "permanent or extended and uncertain duration" to "at least one year" (compare Municipal Code §§ 3.28.120, 3.36.900 to Measure B, § 1509-A(b)), and (2) the potential availability of long-term disability insurance for work-related injuries (Measure B, § 1509-A(d)). Accordingly, because this section has not been implemented, Plaintiffs cannot show a likelihood of success on the merits.

F. Plaintiffs Cannot Prove a Likelihood Of Success on the Merits on Their Challenge to Charter Section 1509-A (c)(Expert Medical Panel)

The plaintiffs do not have a vested right in administering the disability retirement program, let alone in who makes disability determinations. *Claypool v. Wilson*, 155 Cal.App.4th 646, 670 (1992), citing *Whitmire v. City of Eureka,* 29 Cal.App.3d 28, 34 (1972) (where "only administrative and procedural changes " were involved, ordinances restructuring the Commission charged with administering the police and fire retirement system did not violate vested rights).

G. Plaintiffs Cannot Prove A Likelihood Of Success On The Merits On Their Challenge to Charter Section 1511-A (Supplemental Benefit Reserve – "SRBR")

Under the Municipal Code, the SRBR was a discretionary benefit, payable in addition to a retiree's regular pension check, cost of living increases, and retiree medical benefits. With or without the Charter's reservation of rights, the discretion contained in the Municipal Code defeats any claim of vested rights.

Federated Plan. At the time it authorized the SRBR, the City Council expressly reserved its discretion over the funds. The Municipal Code provided, "[t]he city council, after consideration of the recommendation of the board, shall determine the distribution, *if any*, of the supplemental benefit reserve to said persons." (*Id.*, emphasis added.) The City Council exercised its discretion over making SRBR distributions.

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Beginning in 2010, City Council resolutions suspended distribution of SRBR funds for the fiscal years 2010-2011, 2011-2012, and 2012-2013. (MSA RJN, Exhs. L (Resolution No. 75635), M (Resolution No. 76204).)

Police and Fire Plan. In 2001, the City Council amended the Municipal Code to add the SRBR to the Police and Fire Retirement Plan. (Municipal Code § 3.36.580 (A).) The City Council again clearly retained discretion over the SRBR. The City Council reserved discretion to approve the methodology for distributions developed by the Retirement Board. (Municipal Code § 3.36.580(D)(5).) And, as in the case of the Federated SRBR, the City Council *exercised* its legislative discretion over SRBR distributions for Police and Fire retirees.

In 2002, the City Council adopted Resolution No. 70822, which approved "The Methodology for the Distribution Of Moneys In the Supplemental Retiree Benefit Reserve Of the Police and Fire Department Retirement Fund." (MSA RJN, Exh. N (Resolution No. 70822).) Beginning in 2010, the Council amended the Code to provide that "there *shall be no distribution* during calendar years 2010, 2011, 2012 or during calendar year 2013 …." (Municipal Code § 3.36.580 (D)(2) [emphasis added].)

In memoranda to the City Council, the City Manager had recommended suspension of SRBR distributions due to "the plans' significant unfunded liabilities" while "retirement reform discussions continue." (Gurza MSA Dec., Exhs. 44, 45, 46.)

Given that the Municipal Code expressly makes SRBR distributions subject to City Council discretion, and the City Council consistently exercised discretion over payments and the fund, plaintiffs cannot establish the existence of a contractual right in their favor. *Doyle v. City of Medford*, 606 F.3d 667, 675 (9th Cir. 2010) (no property interest under due process analysis when city retains discretion); *Retired Employees' Ass'n of Orange County,* 2012 U.S. Dist. LEXIS 146637, *28-29 (no finding of vested right where governing body exercised its discretion each year). Had the City Council intended to create a right to perpetual SRBR payments "it surely would have said so." *Ventura County Retired Employees' Ass'n*, 228 Cal.App.3d at 1598 (lack of vested right demonstrated by discretionary language that legislative body "may authorize payment of all, or such portion as it may elect" of healthcare premiums for retired employees).

CONCLUSION

Plaintiffs' Motion for a Preliminary Injunction must be denied. They cannot show irreparable harm because implementation of Measure B is not imminent and, even if it were implemented, any alleged harm could be compensated with monetary relief. Moreover, plaintiffs cannot show that they are likely to succeed on the merits. Their brief fails to address the key Charter and Municipal Code sections that govern the issues here.

The Charter contains a reservation of rights that preserves the City's authority to "amend or otherwise change" the provisions of the City's retirement plans and as a matter of law prohibits the creation of vested rights to the contrary. Even in the absence of the Charter's reservation of rights, the City's Municipal Code does not demonstrate any intention to create vested rights, but rather preserves the City's legislative discretion over the employee contribution rates and benefits at issue here.

The Code specifically includes provisions for employees to pay "additional" pension contribution rates and to split retiree healthcare costs on a one-to-one ratio – and employee unions have agreed to do so, including the payment of unfunded liabilities. The Code makes distributions under SRBR discretionary, which defeats any claim of a vested right. And finally, there is no vested right to who determines disability retirements, and the remaining Measure B changes to disability retirement cannot be assessed until implementation, which is not imminent.

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